

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA06-1341

May 30, 2007

ATLANTIC RESEARCH CORP. and
GALLAGHER BASSETT SERVICES, INC.
APPELLANTS

AN APPEAL FROM ARKANSAS
WORKERS' COMPENSATION
COMMISSION [F400145]

V.

JOHN C. BROWN (Deceased)
APPELLEE

AFFIRMED

Atlantic Research Corporation (Atlantic) appeals from an order awarding workers' compensation benefits to the estate of John C. Brown, who suffered a fatal heart attack while mowing grass for Atlantic, his employer. Atlantic raises two points of appeal: the Arkansas Workers' Compensation Commission (Commission) erred in admitting into evidence the medical report and testimony of Dr. William A. Daniel and in finding that Brown's work was the major cause of his fatal heart attack. We disagree and affirm the Commission's order.

Background Facts

Atlantic manufactures propellants that are used in missiles and rockets. John C. Brown worked for Atlantic for approximately five years as a technical operator, performing a variety of duties in the company's production process. According to John Wilson, Brown's supervisor, Brown worked 75% of the time in an air-conditioned environment. Brown also performed "other duties as assigned," which included mowing the company's grass in a thirty-foot perimeter around the buildings between May-August of each year. Wilson said that the mowing was divided among the employees, who volunteered, and that Brown typically mowed

one or two days, every other week, using a push mower. Wilson also said that the amount of mowing varied according to the weather and production needs and that “production took priority.”

The parties stipulated that Brown suffered a fatal heart attack on June 2, 2003, while mowing grass for Atlantic.¹ That morning, Brown and Charles Jenkins, a co-worker, began mowing Atlantic’s grass between 8:30 a.m. and 9:00 a.m., after their fifteen-minute morning break. Jenkins described the grass as “up” and “tall in a lot of places.” He also said that the push mower was hard to push over the tall grass. Jenkins said that the mower would “wear a person out and they would be pretty tired,” and that he preferred to use the weed eater.

The men continued mowing until 11:30 a.m., when they took their thirty-minute lunch break. Although they both wanted to stop mowing at that point because it was “hot and humid,” they resumed mowing, but thereafter took an unscheduled water break at approximately 12:50 p.m. They again resumed mowing and shortly after 1:00 p.m., while mowing in a shaded area, Brown collapsed.

Atlantic’s registered nurse, Christy Keithley, responded with an automated external defibrillator, which she attached to Brown. Keithley testified that if the machine detects a rhythm, it makes a determination to deliver a shock. If there is no rhythm, the machine so indicates and CPR is performed. She said that the machine delivered one shock and did not thereafter “find another discernable shock,” meaning the machine did not detect another heart rhythm.

Keithley opined that Brown died from sudden cardiac arrest. In her report of the incident, she indicated: “Dr. Tabe [the emergency room physician] advised me [the] rescue team did all they could with very good effort but employee’s physical condition was just too

¹The pre-hearing order states that the parties stipulated that “on June 2, 2003, the claimant sustained a heart attack while working for respondent-employer.”

poor; he [Dr. Tabe] believed he [Brown] suffered a massive heart attack.”

The weather records from June 2, 2003, show that at 12:53 p.m., the temperature was 84.8 degrees and the humidity was 65%, yielding a heat index of 91 degrees, the highest it had been that day. Wilson said that Brown’s hat was “soaking wet” with sweat; Brown’s daughter, who found his lab coat in his truck, testified that it was also “wringing wet with sweat.” Brown’s wife, who was given his clothes at the hospital, testified that his clothes were also “really wet.”

At the time of Brown’s death, he was sixty years old and weighed approximately 315 pounds. According to his wife and daughter, he lived a sedentary lifestyle away from work, and used a riding mower to mow the grass at home. Brown also had several health problems. He was being treated for high cholesterol, high blood pressure, and diabetes; each condition was controlled by medication. Approximately two months prior to his death, it was determined that Brown’s heart was mildly enlarged; however, no treatment was ordered in connection with this condition and nothing in the record suggests that Brown was being treated for any heart-related condition. That is, prior to his death, Brown had not suffered from any cardiac-related ailments. He was however, diagnosed with mild obstructive pulmonary disease, a lung condition.

Pursuant to the pre-hearing order, the hearing in this case was originally scheduled for January 20, 2005. This order required the parties to identify the witnesses and to exchange medical reports at least seven days prior to the hearing. The January 20 hearing was postponed because the court reporter failed to appear.

The hearing before the ALJ was actually held on July 21, 2005. At some unspecified time prior to the July 21 hearing, but more than seven days before the hearing, the estate identified Dr. Daniel as a witness and sought to submit his medical report, in which he opined that the cause of Brown’s death was his work activity, mowing. Atlantic argued that Dr.

Daniel's testimony and medical records should not have been admitted at the *July 21 hearing* because the estate did not show good cause for its failure to identify Dr. Daniel prior to the *January 20 hearing* (that never took place). Both the ALJ and the Commission deemed Dr. Daniel's testimony and record report admissible.

The dispositive issue in this case is whether Brown's work activity was the major cause of his fatal heart attack. A death certificate prepared by Dr. Rollin Wycoff, appellant's general practitioner (and Dr. Daniel's partner), indicated that the cause of death was "type II diabetes mellitus." By contrast, Dr. Daniel examined the emergency room records and Nurse Keithley's report and concluded that Brown's heart attack was caused by mowing. Both the ALJ and the Commission determined that Brown's work activity was the major cause of his fatal heart attack.

Standard of Review

On appellate review of workers' compensation cases, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and will affirm the Commission's ruling if there is any substantial evidence to support the findings made. *See Daniels v. Affiliated Foods Southwest*, 70 Ark. App. 319, 17 S.W.3d 817 (2000). Substantial evidence is that relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* If reasonable minds could reach the Commission's conclusion, its decision must be affirmed. *Id.*

It is the exclusive function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *Id.* Once the Commission has made its decision on issues of credibility, the appellate court is bound by that decision. *Id.* It is also the province of the Commission to weigh conflicting medical evidence. *See Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999).

I. Admission of Dr. Daniel's Testimony and Medical Report

Appellant's first argument is that the Commission erred in admitting the testimony and medical report of Dr. Daniel because Brown's estate failed to timely identify Dr. Daniel as a witness at least seven days prior to the first scheduled hearing, as required by Ark. Code Ann. § 11-9-705(c) (Repl. 2002).

This statute provides as follows:

[(2)(A)]Any party proposing to introduce medical reports or testimony of physicians at the hearing of a controverted claim shall, as a condition precedent to the right to do so, furnish to the opposing party and to the commission copies of the written reports of the physicians of their findings and opinions at least seven (7) days prior to the date of the hearing. However, if no written reports are available to a party, then the party shall, in lieu of furnishing the report, notify in writing the opposing party and the commission of the name and address of the physicians proposed to be used as witnesses at least seven (7) days prior to the hearing and the substance of their anticipated testimony.

...

[3] A party failing to observe the requirements of this subsection may not be allowed to introduce medical reports or testimony of physicians at a hearing, except in the discretion of the hearing officer or the commission.

At no time prior to the January 20, 2005 hearing did the estate identify Dr. Daniel as a witness or offer to supply his medical report. The January 20 hearing was postponed and the hearing before the ALJ was held on July 21, 2005. Atlantic did not dispute that the estate timely identified Dr. Daniel and provided notice of his medical report prior to the *July 21* hearing. Instead, it proffered a novel "relate forward" argument – that Dr. Daniel's testimony and medical report should not have been admitted at the *July 21 hearing* because the estate did not show good cause for its failure to identify Dr. Daniel prior to the *January 20 hearing* (that never took place).

The Commission determined that the first hearing was "of no significance" because it was not held. The Commission further found that the admission of the medical report and testimony was proper because the estate identified Dr. Daniel as a witness at least seven days prior to the July 21, 2005 hearing. In so finding, the Commission reasoned that Atlantic's argument was hypertechnical and that the employer was not prejudiced because it was fully

aware of Dr. Daniel's report and the likelihood of being called as a witness "substantially before the actual hearing was held."

We affirm the admission of Dr. Daniel's testimony and medical report. The purpose of the deadline under § 11-9-705(c)(2)(A) is to provide the parties with timely notice of the evidence to be introduced at the hearing. By the plain terms of § 11-9-705(c)(2)(A), notice is timely if it is provided at least seven days "prior to the date of the hearing." Under the interpretation urged by Atlantic, the phrase, "prior to the date of the hearing" should be interpreted to mean "prior to the date of the *first hearing scheduled*, regardless of whether that hearing actually takes place."

We hold, however, that notice is timely under § 11-9-705(c)(2)(A) if it is provided at least seven days prior to the date of the hearing *that actually takes place*. Otherwise, where the original hearing is postponed, a party would *always* be limited to presenting only that evidence that was submitted more than seven days prior to the *original* hearing. Such an outcome contravenes the intent of § 11-9-705(c)(2)(A); it also flatly contradicts the express terms of § 11-9-705(c)(3), which provides the Commission or hearing officer the discretion to admit evidence even if that evidence is not offered in compliance with § 11-9-705(c)(2)(A).

As all parties agree that the notification deadline was met with regard to the July 21 hearing that was actually held, Atlantic cannot demonstrate any error, much less prejudicial error, by the admission of Dr. Daniel's testimony or medical opinion.

II. Compensable Heart Attack

Atlantic further argues that even considering Dr. Daniel's testimony and medical report, the estate failed to show that Brown's employment was the major cause of his fatal heart attack. This argument, too, is without merit.

Where a claimant suffers a fatal heart attack and seeks benefits under § 11-9-114, he

must prove 1) that the heart attack was the major cause of his death, in relation to the other factors contributing to his death, and 2) that the exertion of the work precipitating his death was extraordinary and unusual in comparison to his usual work in the course of his regular employment. *See* Ark. Code Ann. § 11-9-714 (Repl. 2002); *Huffy Service First v. Ledbetter*, 76 Ark. App. 533, 69 S.W.3d 449 (2002). “Major cause” means more than 50% of the cause. Ark. Code Ann. § 11-9-102(14)(A) (Supp. 2005).

A. Major Cause of the Heart Attack

Atlantic first argues that the Commission erred in determining that Brown’s work-related mowing activity was the major cause of his fatal heart attack. The death certificate completed by Dr. Wycoff indicated the cause of death as “type II diabetes mellitus.” However, Dr. Daniel reached a different conclusion in his report, in which he stated:

At the time of his death, [Brown] was actually using a gas lawn mower. He died about 1 p.m. on a day when the maximum temperature was 88 and the maximum humidity was about 89. The patient was 6'1 and weighed approximately 315 pounds. He had a medical history of diabetes, hypertension, and was on medications for these. As I understand it, the question... is whether the activity of the day was extraordinarily unusual to correlate to an accident and constitute the major cause of death.

It is my opinion that this was extraordinary and unusual exertion because [the] activity was more than the patient was usually employed in, and the day was especially hard on a man of his size because of the heat and humidity. His death certificate listed the cause of death as complications of diabetes mellitus of an unknown time. However, at least one physician in the emergency room, Dr. Tabe, suggested that this was a myocardial infarction and from my reading of the history that is available to me, the sudden death, and the inability to resuscitate the patient, I suspect this is caused from a cardiac event, probably an acute myocardial infarction. It happened in the patient’s employment, but not in his usual and customary employment.

Under these circumstances, it is my conclusion that the major cause of death was the extraordinary working conditions rather than underlying medical conditions.

Dr. Daniel, who has been in practice for twenty-seven years, testified that his specialty of internal medicine regularly included diagnostic and prognostic work regarding the heart and heart conditions, as well as the diagnosis and treatment of diabetes, high blood pressure, and high cholesterol. He explained that he had examined the emergency room records and

Keithley's report. He said that the fact that Brown's heart could not be converted back into a normal rhythm supports that Brown suffered a sudden death and that a heart attack would be the most likely cause.

Dr. Daniel admitted that a person who has diabetes is 50% more likely to suffer a heart attack than a person who does not have diabetes. He also admitted that a person who has high blood pressure or high cholesterol has a greater chance of having a heart attack than someone who does not have those symptoms. However, Dr. Daniel stated that where those conditions are controlled, the person's chance of having a heart attack are "greatly" reduced.

Dr. Daniel concluded that Brown's death "was not a classic diabetic death" because death due to complications from diabetes will be preceded by warning signs, such as extreme high blood sugar, electrolyte abnormality, renal failure, or vascular disease. Here, there was no evidence that Brown experienced any of the symptoms that precede a "classic diabetic death."

Dr. Daniel said that the heat index and humidity were contributing factors to the extraordinary nature of Brown's exertion and work conditions, because a heat index of ninety degrees is hazardous. The heat index at the time Brown died was ninety-one degrees, the highest it had been all day. Thus, the doctor concluded that the major cause of Brown's death, *apart from any underlying medical problems*, was his extraordinary working conditions, including the heat and humidity.

Atlantic attempts to discredit Dr. Daniel's conclusion that Brown's heart attack was caused by his work activity. First, it argues that because Dr. Daniel testified that a person who has diabetes has a 50% greater chance of having a heart attack than a person who does not have diabetes, Brown's estate can never establish that his work activity was at least 51% of the cause of his death. Further, because Brown was first diagnosed with diabetes in 1999, Atlantic contends (without citation to any authority) that because Dr. Daniel suggested that

Brown's chance of having a heart attack "increased by fifty percent (50%) more than the previous year," Brown's chances of having a heart attack in 2003 was 90%.

Atlantic misconstrues or misrepresents Dr. Daniel's testimony. It is clear from Dr. Daniel's testimony that the 50% statistic presumes that the diabetes is *uncontrolled* because he further testified that the fact that Brown controlled his diabetes and blood pressure "greatly" lowered his risk of a heart attack based on those conditions. It follows then, that, a person who controls his predisposing conditions, as Brown did, would not be statistically precluded from proving that his work conditions were the major cause of his heart attack.

Atlantic next challenges Dr. Daniel's conclusion that Brown's heart attack was caused by his work activity. The employer relies heavily on the fact that Brown had the forenoted health conditions that predisposed him to having a heart attack. Atlantic maintains that Dr. Daniel's testimony and Brown's preexisting conditions mean that Brown's condition was "so far compromised that even the slightest exertion could induce fatal results" and that he was likely to experience a heart attack "at any time."²

The problem for Atlantic is that it essentially argues that because there was medical evidence that would support a contrary conclusion, the Commission improperly weighed the medical evidence. However, the mere fact that there was evidence supporting a contrary finding does not allow this court to reverse the Commission's resolution of conflicting medical evidence. *See, e.g., Kempner's & Dodson Ins. Co. v. Hall*, 7 Ark. App. 181, 646 S.W.2d 31 (1983) (affirming the Commission's finding that the claimant's myocardial infarction was the result of his work and was not the result of a preexisting coronary artery disease, even though there was evidence to the contrary).

²Atlantic also argues that Dr. Daniel's opinion is not credible because it was based only on the information that Brown's estate provided and because he was provided with "legal precedent" explaining the "extraordinary and unusual" work requirement. Atlantic is now bound, as are we, by the Commission's implicit credibility determination regarding Dr. Daniel's medical opinion and testimony.

Atlantic would apparently have this court hold that the mere fact that a claimant has factors that predispose him to a heart attack precludes a claim for death benefits based on a heart attack, regardless of the countervailing evidence against a casual connection between the predisposing factors and the heart attack. Simply put, a person who has predisposing factors may yet suffer a heart attack that is caused by something *other than* those predisposing factors. As such, the existence of predisposing factors is merely causal evidence for the Commission to assess.

In that regard, the Commission was not required to give more weight to Dr. Wycoff's conclusion that Brown's heart attack was diabetes-related, especially when 1) the basis for Dr. Wycoff's determination that the heart attack was the result of complications from diabetes is not clear or persuasive, 2) that conclusion contradicts the records that indicate Brown's diabetes and predisposing factors were under control, and 3) the records are devoid of any indication that Brown suffered from any of the various diabetes-related symptoms that Dr. Daniel explained are known to precede a diabetes-induced heart attack. Notably, Atlantic does not dispute Dr. Daniel's conclusion that the inability to resuscitate Brown suggests an acute myocardial infarction as opposed to a heart attack caused by complications from diabetes.

While Atlantic minimally takes issue with the fact that Dr. Daniel relied on hearsay testimony in the form of Dr. Tabe's emergency room record (which was not admitted into evidence), we note that Atlantic does not challenge the veracity of Dr. Daniel's statement that Dr. Tabe suggested that the cause of death was a heart attack. In addition, Dr. Daniel's opinion is also consistent with that of Nurse Keithley, who was present while attempts were made to revive Brown. On these facts, we hold that the Commission did not err in determining that Brown's estate proved that his work activity was the major cause of his fatal heart attack.

B. Extraordinary and Unusual Work

Substantial evidence also supports the Commission's finding that Brown's fatal heart attack was precipitated by the exertion of mowing and that his work of mowing was extraordinary and unusual in comparison to Brown's usual work in the course of his regular employment. Even though mowing grass generally was considered by Atlantic to be part of Brown's other duties as assigned, the record reflects that he performed that job intermittently throughout part of the year, and that mowing was not part of his usual job. The mowing season lasted from late May through August. According to Brown's supervisor, the task was divided among the employees, and Brown typically mowed one or two days, every other week. Because the mowing duties were divided among the employees, the Commission determined that Brown mowed no more than five or six times each year. Notably, Brown's "other duties" were not detailed in his job description and were not the basis for his performance evaluations, which also supports the finding that mowing was not a "regular" part of his job. On these facts, the Commission did not err in determining that Brown's usual job duties did not involve mowing.

The evidence also established that the exertion required to mow, in general, was extraordinary and unusual compared to Brown's normal duties. Brown's usual duties involved quality control, most of which took place in an air-conditioned environment. Even though some of Brown's indoor duties took place in a non air-conditioned environment, those duties were low intensity duties and did not require the physical exertion that mowing requires.

Moreover, the evidence specifically supports a finding that the exertion Brown engaged in on June 2, 2003 was extraordinary and unusual. Even though Brown had previously mowed that year, it was still early in the mowing season, which supports that he had not had time to adjust to the more strenuous working conditions that mowing required. It was a humid day (in fact, it rained later that day); the heat index at the time of Brown's collapse was 91 degrees, above the "dangerous" mark. In fact, Jenkins testified that he and Brown wanted to stop

mowing after their first break because of the weather.

Jenkins described the grass as “up” and “tall in a lot of places” and said that the mower was hard to push. According to Jenkins, the mower would “wear a person out and they would be pretty tired.” Brown mowed from approximately 9:45 a.m. to 11:30 a.m. He took a lunch break from 11:30 a.m. to 12:00 p.m., resumed mowing, and required a break to replenish his fluids approximately forty minutes after he resumed mowing. The break ended at approximately 12:50 p.m. Brown collapsed and died from a heart attack shortly after 1:00 p.m.

Brown’s work clothes and cap were soaking wet, indicating that he had been sweating profusely. Certainly sweating while mowing is not unexpected, because sweating is the body’s cooling mechanism. However, the evidence suggests that the fact that Brown sweated so profusely was an indicator of overexertion and that Brown’s body was not properly cooling itself. *See, e.g., Huffy, supra* (finding the decedent’s work was extraordinary and unusual where, among other things, his clothing was “frosted” with salt, indicating that he had sweated profusely).

In a nutshell, Brown’s ordinary and usual job did *not* involve maneuvering a hard-to-push manual mower over tall, hard-to-mow grass for several hours in dangerous heat. *See, e.g., Huffy, supra* (affirming the Commission’s finding that the claimant’s work conditions were extraordinary or unusual and precipitated a compensable heart attack where, even though the claimant had assembled tractors in similar conditions for two consecutive summers, the claimant was working outside, alone, without proper ventilation, on a black asphalt surface, where the heat index reached over 100 degrees, and where there was evidence that worker did not assemble tractors under those conditions in the normal course of his employment). As the Commission noted, simply because a task is specifically delegated as a job duty does not mean that it is not extraordinary and unusual in relation to a claimant’s *regular* job duties. Thus, the

fact that Brown's "other duties" required him to cut the grass from time-to-time did not preclude a finding that mowing was not extraordinary and unusual in relation to Brown's regular, low-intensity, air-conditioned job duties.

Affirmed.

PITTMAN, C.J., and BIRD, J., agree.